



## A. Introduction

Among the existing instruments on European international civil procedure, the Regulation 44/2001 ('Brussels I')<sup>1</sup> which came into force on 1 March 2002 is certainly the most important one.<sup>2</sup> It has the widest scope covering almost all civil and commercial matters and concerns the most important questions of international civil litigation, namely heads of jurisdiction and recognition and enforcement of judgments given in another Member State (except Denmark).<sup>3</sup> Brussels I is one of the most successful pieces of European legislation.<sup>4</sup> However, only a week before the regulation's eighth anniversary the Commission presented its reform proposal on 14 December 2010 ('the Proposal').<sup>5</sup> Despite the success of Brussels I the Proposal will result in considerable changes, should it be realised in its current form. Against the background that European law guarantees economic freedoms<sup>6</sup> cross-border recognition and enforcement of judgments within the European Union ('EU') is of considerable and increasing importance. Brussels I continued the project started by its predecessor, the Brussels Convention 1968,<sup>7</sup> with the final aim of free movement of judgments (recital 6) within the European Union as a single area of freedom, security and jus-

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<sup>1</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (hereinafter: 'Brussels I').

<sup>2</sup> Magnus/Mankowski/*Magnus*, Introduction para. 12, for the main currently existing instruments cf. para. 10.

<sup>3</sup> Art. 1(3) Brussels I and recital 21 in accordance with Protocol No 22 on the position of Denmark [2008] OJ C 115/299. For the relations between the EU and Denmark cf. the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62.

<sup>4</sup> European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (P7\_TA(2010)0304), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2010-0304+0+DOC+PDF+V0//EN> (last accessed: 03.07.2011) (hereinafter 'Resolution of 7 September 2010'), recital A.

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final.

<sup>6</sup> For these so-called "four freedoms" see Art. 21, 28 et seqq., 45, 49 et seqq., 56 et seqq., 63 et seqq. TFEU.

<sup>7</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, (consolidated version) [1998] OJ C 27/1 (hereinafter 'Brussels Convention').



tice.<sup>8</sup> *Inter alia* it provides for a simplified and accelerated procedure to obtain the required declaration of enforceability (*the exequatur*) in the Member State of enforcement. Now the general abolishment of this exequatur lies at the heart of the Proposal. It is accompanied by plans to reform the existing defences. However, reforms should be accepted only if they improve the *status quo* considering the relevant interests, and if they are justified by practical needs. That may conflict with the political aim at European level but reforms are expensive and, if proposed for the mere sake of novelty, they could unnecessarily interfere with the well established structure and principles of Brussels I.

This paper analyses and discusses the most relevant aspects of the abolishment of the exequatur and the reform of the defences under the Proposal. First, the background on the preparation of the Proposal and its underlying principles will be provided in chapter A. In chapter B the cross-border enforcement regimes of Brussels I and the Proposal will be presented. Then the abolishment of the exequatur will be critically discussed with regard to its underlying rationales and the functions of the exequatur. The chapter concludes with the implications of the abolishment for the existing defences. The reform of the defences is discussed in Chapter C. It will be analysed whether the relevant Proposal provisions provide sufficient protection and comply with the principle of mutual recognition. Particular emphasis is put on the *ordre public* defence and its fundamental rights implications. Finally, suggestions to amend the Proposal are made throughout the paper.

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<sup>8</sup> Art. 3(2) Treaty on European Union (consolidated version) [2010] OJ C 83/13 (hereinafter ‘TEU’), Art. 67-89 The Treaty on the Functioning of the European Union (consolidated version) [2010] OJ C 83/47 (hereinafter ‘TFEU’).

## B. Background: review and reform of the Brussels I Regulation

Art. 73 Brussels I obliged the Commission to present a report on the application of the Regulation five years after its entry into force, i.e. in 1 March 2007. In preparing this report the Commission took into account several external studies,<sup>9</sup> most notably for the purpose of this paper, a study by *Hess, Pfeiffer and Schlosser* on the practical application of Brussels I – the *Heidelberg Report* (2007)<sup>10</sup> – based *inter alia* on national reports of the Member States.<sup>11</sup> With considerable delay the Commission presented its Report on Brussels I<sup>12</sup> together with a Green Paper<sup>13</sup> in April 2009. According to the Report the regulation is very successful and highly appreciated among practitioners with, however, room for improvements.<sup>14</sup> The Green Paper identified specific aspects where improvements are conceivable and initiated a consultation<sup>15</sup> of the interested public which resulted in a total of 130 responses.<sup>16</sup> The European Parliament passed a resolution on the implementation and review of Brussels I in 7 September 2010.<sup>17</sup> On the basis of these extensive preparatory works the Commission finally presented its Proposal for a new regulation in 14 December 2010. It is accompanied by an Explanatory Memorandum<sup>18</sup> stating the reasons for the reform

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<sup>9</sup> Cf. Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter ‘Explanatory Memorandum’), COM(2010) 748 final, para. 2 with further reference.

<sup>10</sup> For a revised version of this study cf. *Hess/Pfeiffer/Schlosser*, Heidelberg Report.

<sup>11</sup> Available at: [http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm) (last accessed: 01.07.2011).

<sup>12</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (21.04.2009) (hereinafter ‘The Report’), COM(2009) 174 final.

<sup>13</sup> Green Paper on the review of Council Regulation (EC) No 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (21.04.2009) (hereinafter ‘The Green Paper’), COM(2009) 175 final.

<sup>14</sup> The Report, COM(2009) 175 final, para. 2.2.

<sup>15</sup> For the questions concerning the abolishment of the exequatur, The Green Paper, COM(2009) 175 final, p. 3.

<sup>16</sup> Available at: [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm) (last accessed 01.07.2011).

<sup>17</sup> European Parliament, Resolution of 7 September 2010 (P7\_TA(2010)0304).

<sup>18</sup> COM(2010) 748 final.

proposals and an Impact Assessment<sup>19</sup> analysing the costs and benefits of their main aspects. The legal basis of the new regulation is Art. 81(2)(a), (c), and (e) TFEU and its adoption has to follow the ordinary legislative procedure of Art. 289(1), 294 TFEU. Fortunately, from a European perspective, the United Kingdom (UK) and Ireland confirmed their participation in the reform in accordance with Protocol 21<sup>20</sup> in April 2011.<sup>21</sup>

Since the Treaty of Amsterdam (1997) the creation of the area of freedom, security and justice is an important field of European policy implying the application of the techniques of integration to European civil procedural law.<sup>22</sup> In the presidency conclusion of the Tampere Summit 1999 the European Council declared the principle of mutual recognition the “cornerstone of judicial cooperation” within the EU.<sup>23</sup> With the Treaty of Lisbon this principle is now expressed in the Treaty.<sup>24</sup> Thus, corresponding to the European Council’s Stockholm Programme (2009),<sup>25</sup> the Commission’s reform objective is to facilitate cross-border litigation and the free movement of judgments in line with the principle of mutual recognition.<sup>26</sup> Although the proposed reform comprises several elements,<sup>27</sup> the abolishment of exequatur plays the central role in the Proposal. On 26 June 2011 the European Parliament presented a draft report on the

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<sup>19</sup> Commission Staff Working Paper – Impact Assessment – Accompanying document to the Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), 14.12.2010 (hereinafter ‘Impact Assessment’), SEC(2010) 1547 final.

<sup>20</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice [2010] OJ C 83/295.

<sup>21</sup> Cf. *Bar Council*, Brussels News June 2011, available at: <http://www.barcouncil.org.uk/aboutthebarcouncil/BrusselsOffice/BrusselsNewsJune2011/> (last accessed: 03.07. 2011).

<sup>22</sup> Cf. *Hess/Pfeiffer/Schlosser*, Heidelberg Report, para. 61.

<sup>23</sup> European Council, Tampere European Council (15./16.10.1999), Presidency Conclusions, available at: [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm) (last accessed: 03.07.2011), (hereinafter ‘Tampere Conclusions’), para. 33.

<sup>24</sup> Concerning civil matters: Art. 67(4), 81(1), (2)(a) TFEU.

<sup>25</sup> European Council, The Stockholm Programme – An open and secure Europe serving and protecting the citizens (10./11.12.2009), OJ 2010 C 115/1 (hereinafter ‘Stockholm Programme’), p. 13.

<sup>26</sup> Explanatory Memorandum, COM(2010) 748 final, para. 1.2.; cf. also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe’s citizens – Action Plan Implementing the Stockholm Programme, COM(2010) 171, p. 19.

<sup>27</sup> Cf. Explanatory Memorandum, COM(2010) 748 final, para. 3.1.; also *Carruthers*, SLT 2011, p. 31 et seqq.



Commission's Proposal with a Parliament Resolution recommending several amendments and accompanied by an explanatory statement.<sup>28</sup>

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<sup>28</sup> EU Parliament – Committee on Legal Affairs, Draft Report 2010/0383(COD) (26.06.2011).